UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
---X
THE UNITED STATES OF AMERICA

Docket No. **0208 1:15CR00667-011**

-against-

ANTHONY CABA,

Defendant.
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PRE-SENTENCING MEMORANDUM AND CHARACTER/SUPPORT LETTERS

Respectfully Submitted,

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UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA

Docket No. 0208 1:15CR00667-011

-against-

ANTHONY CABA,

Defendant

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SENTENCING MEMORANDUM ON BEHALF OF DEFENDANT, ANTHONY CABA

Through counsel, the Defendant, Anthony Caba, files this objection to the Presentence Investigation Report and a Sentencing Memorandum with character and support letters and associated documents in support of Defendant's position regarding sentencing which is in fact and in short, a cry out for Probation. The Presentence Investigation Report provided by the United States Probation Office states that the correct offense level for Anthony Caba, is a level 22, thus qualifying Anthony Caba for a sentencing range of 46 to 57 months.

Almost the entire Presentence Investigation Report for defendant, Anthony Caba, has nothing to do with Anthony Caba except that to his everlasting regret, some years into the instant conspiracy defendant Anthony Caba started work at the company controlled and micro-managed by co-defendants and cooperators and while making roughly minimum wage bought into the culture of the more egregious notions of bill collecting prevalent at the company called Five Star Resolution. Defendant Caba was given a script and told by Owners, Managers and Compliance Officers that he was to stick to the script in order to make his paltry wages used exclusively to feed his young family. The very notion that Defendant Anthony Caba, the minimum wage, twelve dollars an hour line collector, was rightfully and participatory-wise responsible for a $31 million dollar scheme to prey on alleged innocent and vulnerable debtors is fanciful at best and wildly uncalibrated as it pertains to Defendant Anthony Caba.

Defendant, Anthony Caba, by and through counsel, first makes his objection to the sentencing level and loss amount attributed to Defendant, Anthony Caba in the Presentence Investigation Report. Thus, Defendant Anthony Caba, hereby requests a hearing pursuant to United States v. Fatico, 603 F. 2d 1053 (2d Cir.1979) to determine the "value of the illegal transactions," USSG 2C1.8(b))1), relevant to his guidelines calculation.

As has been recognized, though, "with their almost singular focus on loss amount, the guidelines sometimes are insufficiently sensitive to personal culpability." United States v. Milne, 384 F. Supp 2d 1309 (E.D. Wisc. 2005) See also, United States v. Stuart, 22 F. 3d 76 (3rd Cir. 1994 (" in a few circumstances, strict application of the loss tables can overstate the seriousness of the offense"). The Constitution Project also recognized as much.[1] The Project's Sentencing Initiative report concludes that the Sentencing Guidelines "place excessive emphasis on quantifiable factors such as monetary loss and drug quantity, and not enough on other considerations such as the defendant's role in the criminal conduct."[2] The end result is that the Guidelines produce sentences that, while uniform by the standards of the Guidelines, sometimes sentence those minimally involved much like those who are central figures in the crime. Given

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[1] It is a group which describes itself as 'a bipartisan nonprofit organization that seeks consensus on controversial legal and constitutional issues through a unique combination of scholarship and activism." www.constitutionalproject.org/index.cfm. Its Sentencing Initiative Project included such preeminent jurists as now United States Supreme Court Justice Samuel Alito and former United States District Court Judge Paul Cassel, author of the decision in United States v.Wilson, 350 F. Supp. 2d 910 (D Utah 2005).

[2] http://www.consttutionalproject.org/article.cfm?messageID=101

Mr. Caba's role in this offense, that is exactly the circumstances here.

The commentary to 2B1.1 notes that "there may be cases in which the offense level determined under this guideline substantially overstates the seriousness of the offense" and that in "such cases, a downward departure may be warranted." USSG 2B1.1 comment. (n. 19 (C)). see also, United States v. Costello, 16 F. Supp. 2d 36, 40 (D. Mass. 1998) ("I conclude that in this situation a downward departure is warranted because the $20 million loss figure substantially overstates the defendant's culpability.") With the greater discretion afforded courts by the decision in United States v. Booker, 543 U.S. 220 (2005) courts have also granted variances in cases where the loss amount overstated the defendant's responsibility. See, e.g. United States v. Ranum, 353 F. Supp 2d 984, 990 (E.D. Wis. 2005) (where the court "found the guideline range, which depended so heavily on the loss amount, greater than necessary"); United States v. Samaras, 390 F. Supp. 2d 805, 809 (E.D. Wis 2005) (where the court imposed a below-guideline sentence noting that "defendant's guideline range was driven by the high loss amount, yet he played no role in setting that amount and he profited no more than in his legitimate business dealings"); United States v. Watt, 2010 WL 1676439, *16 (D. Mass. April 27, 2010) (Where the court imposed a below-guideline sentence recognizing that the guideline scheme, which effectively makes loss "a proxy for evaluating culpability" was not always appropriate.

Secondly, Defendant, Anthony Caba, would implore the court to evaluate all the U.S.C. 3553 factors in determining an adequate sentence. Lastly, the Defendant, Anthony Caba, has attached herewith and made a part of this sentencing submission, approximately 20 character letters and evidence of Defendant, Anthony Caba's artistic musical endeavors hoping to show to the United States and this court the true character of defendant, Anthony Caba.

SENTENCING UNDER BOOKER

On January 12, 2005, the Supreme Court ruled that its Sixth Amendment holding in Blakely v. Washington, 124 S. Ct. 2531 (2004) and Apprendi v. New Jersey, 530 U.S. 466 (2000) applies to Federal Sentencing Guidelines. United States v. Booker, 125 S. Ct. 738, 756 (2005). Given the mandatory nature of the Sentencing Guidelines at then time, the Court found there to be no relevant distinction between the sentence imposed pursuant to the Washington statutes in Blakely and the sentences imposed pursuant to the Federal Sentencing Guidelines in the cases before the Court. Ibid. at 751. Accordingly, reaffirming its holding in Apprendi, the Court concluded that:

> "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."

Based on this conclusion, the Court further found those provisions of the federal Sentencing Reform Act of 1984 that make the Guidelines mandatory, 18 U.S.C. 3553 (b) (1) or which rely upon the Guidelines' mandatory nature, 18 U.S.C. 3742 (e), incompatible with its Sixth Amendment holding. Booker, 125 S. Ct. at 756. Accordingly, the Court severed and excised those provisions, mak[ing] the Guidelines effectively advisory. Ibid., at 757.

Instead of being bound by the Sentencing Guidelines, the Sentencing Reform Act, as revised by Booker, requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. 3553 (a) (4) (Supp. 2004), but it permits the Court to tailor the sentence in light of other statutory concerns as well, see 3553 (a). Booker, 125 S.Ct. at 757. In sum, under Booker, sentencing courts must treat the Guidelines as just one of a number of sentencing factors set forth in 18 U.S.C. 3553 (a).

The primary directive in Section 3553 (a) is for sentencing courts to impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph 2.

Section 3553 (a) (2) states that such purposes are:

(a) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(b) to afford adequate deterrence to criminal conduct;

(c) to protect the public from further crimes of the defendant; and

(d) to provide the defendant with the needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

In determining the minimally sufficient sentence, 3553 (a) further directs sentencing courts to consider the following factors:

(a) The nature and circumstances of the offense and the history and characteristics of the defendant (3553 [a] [1]);

(b) The kinds of sentences available (3553 [a] [3]);

(c) The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct (3553 [a] [6]); and

(d) The need to provide restitution to any victims of the offense. (3553 [a] [7].

Other statutory sections also give the district court direction in sentencing. Under 18 U.S.C. 3582, imposition of a term of imprisonment is subject to the following limitation: in determining whether and to what extent imprisonment is appropriate based on the Section 3553 (a) factors, the judge is required to "recogniz[e] that imprisonment is *not* an appropriate means of promoting correction and rehabilitation" (emphasis added).

Under U.S.C. 3661, *No limitation* shall be placed on the information concerning the background, character, and conduct of [the defendant] which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence (emphasis added). This statutory language certainly overrides the (now advisory) policy statements in Part H of the sentencing guidelines, which list as not ordinarily relevant to sentencing a variety of factors such as the defendant's age, education and vocational skills , mental and emotional conditions, drug or alcohol dependence, and lack of guidance as a youth. *See* U.S.S. G 5 H 1.

The directives of Booker and 3553 (a) make clear that courts may no longer uncritically apply the guidelines. Such an approach would be inconsistent with the holdings of the merits majority in Booker, rejecting mandatory guideline sentences based on judicial fact-finding, and the remedial majority in Booker, directing courts to consider all of the 3553 (a) factors, many of which the guidelines either reject or ignore. As another district court judge has correctly observed, any approach which automatically gives heavy weight to the guideline range comes perilously close to the mandatory regime found to be constitutionally infirm in Booker, See United States v. Jaber, 362 F. Supp. 2d 365, 371 (D. Mass. March 16, 2005) (Gertner, J.). See also United States v. Ameline, 400 F. 3d 646, 655-56 (9th Cir Feb 9, 2005) (advisory guideline range is only one of many factors that a sentencing judge must consider in determining an appropriate individualized sentence), reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005).

Justice Scalia explains the point well in his dissent from Booker's remedial holding:

> Thus, logic compels the conclusion that the sentencing judge, after considering the recited factors (including the guidelines), has full discretion, as full as what he possessed before the Act was passed, to sentence anywhere within the statutory range. If the majority thought otherwise, if it thought the Guidelines not only had to be considered (as the amputated statute requires) but had generally to be followed, its opinion would surely say so.

Booker, 125 S. Ct. at 791 (Scalia, J., dissenting in part). Likewise, if the remedial majority thought the guidelines had to be given heavy weight, its opinion would have said so. The